



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R09-OAR-2012-0194; FRL-9664-5]

**Approval and Promulgation of Implementation Plans;
California; Revisions to the California State Implementation Plan Pesticide Element**

AGENCY: U.S. Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve several revisions to the Pesticide Element of the California state implementation plan (SIP). These revisions include regulations adopted by the California Department of Pesticide Regulation (CDPR) that: 1) reduce volatile organic compound (VOC) emissions from the application of agricultural field fumigants in the South Coast, Southeast Desert, Ventura, San Joaquin Valley (SJV), and Sacramento Metro ozone nonattainment areas by restricting fumigant application methods; 2) establish a contingency fumigant emissions limit and allocation system for Ventura; 3) require CDPR to prepare and make available to the public an annual pesticide VOC emissions inventory report; and 4) require recordkeeping and reporting of pesticide usage. EPA also proposes to approve CDPR's commitments to manage VOC emissions from the use of agricultural and commercial structural pesticides in the SJV to ensure that they do not exceed 18.1 tons per day and to implement restrictions on VOC emissions in the SJV from non-fumigant pesticides by 2014. Lastly, EPA is providing its response to a remand by the Ninth Circuit Court of Appeals of EPA's 2009 approval of a revision to the California SIP related to reducing VOC emissions from pesticides.

DATES: Any comments must arrive by **[Insert date 30 days from the date of publication in the Federal Register]**.

ADDRESSES: Submit comments, identified by docket number EPA-R09-OAR-2012-0194, by one of the following methods:

- Federal eRulemaking Portal: www.regulations.gov. Follow the on-line instructions.
- E-mail: steckel.andrew@epa.gov.
- Mail or deliver: Andrew Steckel, (AIR-4), U.S. Environmental Protection Agency Region 9, 75 Hawthorne Street, San Francisco, CA 94105.

Instructions: All comments will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through www.regulations.gov or e-mail. The www.regulations.gov website is an “anonymous access” system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comments due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Docket: The technical support document (TSD) and the index to the docket for this proposed action is available electronically on the www.regulations.gov website and in hard copy at EPA Region 9, 75 Hawthorne Street, San Francisco, California, 94105. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available at either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal

business hours with either of the contacts listed in the FOR FURTHER INFORMATION CONTACT section below.

FOR FURTHER INFORMATION CONTACT: For information on the proposed action on CDPR's regulations: Nancy Levin, Rules Office (AIR-4), (415) 972-3848, levin.nancy@epa.gov. For information on the proposed actions on CDPR's commitments and the PEST-1 measure: Frances Wicher, Air Planning Office (AIR-2), (415) 972-3957, wicher.frances@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document, "we", "us" and "our" refer to EPA.

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I. Introduction

This proposed action deals with revisions to California's federally-approved program to reduce emissions from the use of agricultural and structural pesticides to improve ozone air quality in five areas of the State: the South Coast, Southeast Desert (SED), Ventura, San Joaquin Valley (SJV), and Sacramento Metro nonattainment areas. Pesticides contribute to ozone pollution through the emissions of volatile organic compounds (VOC). VOC react in the atmosphere with nitrogen oxides (NO_x) in the presence of sunlight to form ozone. Breathing ground-level ozone can result in a number of health effects that are observed in broad segments of the population. These health effects include reduced lung function and inflamed airways, which can increase respiratory symptoms and aggravate asthma or other lung diseases. Ozone exposure also has been associated with increased susceptibility to respiratory infections, medication use, doctor visits, and emergency department visits and hospital admissions for individuals with lung disease. Ozone exposure also increases the risk of premature death from heart or lung disease. Children are at increased risk from exposure to ozone because their lungs are still developing and they are more likely to be active outdoors, which increases their exposure.

Pesticides contribute about 5 percent to total VOC emissions in SJV and Ventura ozone nonattainment areas and less than 1 percent to total VOC emissions in the South Coast, SED, and Sacramento Metro areas. *See* TSD, section I.D.

This proposal addresses the regulation of VOC emissions from pesticides under the federal Clean Air Act (CAA or "Act"). Pesticides and their uses and application are primarily

regulated under Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). This proposal does not address regulations of pesticides under FIFRA or other federal acts.

II. The Current California SIP Pesticide Element and a Description of the Proposed Revisions

A. Currently-Approved Provisions of the California SIP Pesticide Element

Prior to today's proposal, EPA has taken three actions to either approve or revise provisions of the California SIP Pesticide Element. We briefly describe each action below. More information on each action and its background can be found in section I.E. of the TSD for this proposal.

- *1994 Pesticide Element* – The 1994 Pesticide Element was submitted by California in November 1994 as part of the State's comprehensive 1-hour ozone attainment plan (known as the 1994 Ozone SIP) and included a plan by CDPR to reduce VOC emissions from agricultural and structural pesticides in five ozone nonattainment areas by a maximum of 20 percent from 1990 baseline levels by 2005 and to adopt regulations if necessary to achieve these reductions. EPA approved the 1994 Pesticide Element on January 8, 1997 (62 FR 1150) and codified it at 40 CFR 52.220(c)(204)(i)(A)(6) and 52.220(c)(236).
- *PEST-1 Measure in CARB's 2003 State Strategy* – In 2003, the California Air Resources Board (CARB) updated the statewide strategy that was part of the 1994 Ozone SIP. One of the measures in the 2003 State Strategy was PEST-1 ("Implement Existing Pesticide Strategy"), which retained and continued unchanged the provisions of the 1994 Pesticide Element. EPA approved the PEST-1 measure into the California SIP as part of its action to approve in part and disapprove in part the 2003 South Coast Air Quality Management Plan

and 2003 State Strategy. *See* 74 FR 10176 (March 10, 2009), codified at 40 CFR 52.220(c)(339)(ii)(A)(I).¹

- *2007 Ventura Pesticide Element* – In 2007, CARB submitted a revision to the Ventura portion of the 1994 Pesticide Element. This revision reduced in part and temporally the emissions reduction commitment for Ventura in 1994 Pesticide Element. EPA approved this revision in 2008. *See* 73 FR 41277 (July 18, 2008), codified at 40 CFR 52.220(c)(355)(i)(A).

B. Proposed Revisions to the California SIP Pesticide Element

EPA is proposing to approve regulations and commitments adopted by the CDPR to limit VOC emissions from the use of agricultural and commercial structural pesticides in the South Coast, SED, Ventura, SJV, and Sacramento Metro ozone nonattainment areas.² These CDPR regulations and commitments were submitted by CARB to EPA as follows:

1. October 12, 2009 submittal³ of the following CDPR regulations:

- Title 3 California Code of Regulations (CCR), sections 6447 (first paragraph) and 6447.3-6452 pertaining to field fumigation methods;
- Portions of 3 CCR sections 6452.1-6452.4 and sections 6624-6626 pertaining to emission inventory;

¹ In *Association of Irrigated Residents v. EPA*, No. 09-71383, the 9th Circuit Court of Appeals remanded the approval of PEST-1 to EPA with the instructions to determine whether the Pesticide Element has sufficient enforcement mechanisms to satisfy the requirements of the Clean Air Act (CAA or Act). We provide our response to the remand in section IV of this notice.

² The South Coast nonattainment area includes Orange County and portions of Los Angeles, San Bernardino, and Riverside Counties. The Southeast Desert (SED) nonattainment area includes the Coachella Valley in Riverside County, Antelope Valley in Los Angeles County, and the southwestern quadrant of San Bernardino County. The Ventura nonattainment area is Ventura County. The San Joaquin Valley (SJV) nonattainment area includes San Joaquin, Stanislaus, Merced, Madera, Fresno, Tulare and Kings Counties and the valley portion of Kern County. The Sacramento Metro nonattainment area includes Sacramento County and parts of El Dorado, Placer, Solano and Sutter Counties.

³ *See* letter, James N. Goldstene, Executive Officer, CARB to Laura Yoshii, Acting Regional Administrator, EPA Region 9, October 12, 2009.

- 3 CCR sections 6452.2 and 6452.3 pertaining to field fumigation limits and allowances in the Ventura ozone nonattainment area.⁴
2. October 12, 2009 submittal⁵ of CDPR's revised "Pesticide Emission Reduction Commitment for the San Joaquin Valley". This submittal caps VOC emissions from the use of agricultural and commercial structural pesticides in the SJV to 18.1 tpd and commits CDPR to implement restrictions on non-fumigant pesticides in the SJV by 2014.
3. August 2, 2011 submittal⁶ of the following CDPR regulations which revised in part and added to the October 12, 2009 submittal:⁷
- 3 CCR sections 6448.1, 6449.1, and 6450.1 pertaining to fumigation method restrictions.
 - Portions of 3 CCR sections 6452.2 and 6452.3 pertaining to field fumigation limits and allowances in the Ventura ozone nonattainment area.
 - 3 CCR section 6452.4 pertaining to the annual VOC emissions inventory report.
 - 3 CCR sections 6624 and 6626 pertaining to pesticide use records and reports.

The submitted CDPR regulations that we are proposing action on today can be divided into four distinct but related parts. The first part (3 CCR sections 6447 through 6452) establishes

⁴ CARB did not submit for inclusion into the SIP those portions of 3 CCR sections 6452.2 and 6452.3 pertaining to field fumigation limits and allowances in the South Coast, SED, SJV, and Sacramento Metro ozone nonattainment areas.

⁵ See letter, James N. Goldstene, Executive Officer, CARB to Laura Yoshii, Acting Regional Administrator, EPA Region 9, October 12, 2009.

⁶ See letter, James N. Goldstene, Executive Officer, CARB to Jared Blumenfeld, Regional Administrator, EPA Region 9, August 2, 2011.

⁷ As part of its August 2, 2011 submittal, CARB also submitted 3 CCR section 6400 (Restricted Materials), 6446 (Methyl Iodide Field – General Requirements) and section 6446.1 (Methyl Iodide Field Fumigation Methods) and methyl-iodide related portions of provisions 6452.2(a)(4)(Annual Volatile Organic Compound Emissions Inventory Report) and 6624(f) (Pesticide Use Records). We are deferring action on these provisions due to California's cancellation, effective March 21, 2012, of the registration of all products containing the active ingredient methyl iodide. CDPR adopted this set of methyl iodide-related regulations on May 11, 2011, after and separately from the CDPR April 7, 2011 regulations that are also included in the CARB August 2, 2011 submittal.

standards for fumigant application and restricts the use of certain higher-emitting application methods in the five nonattainment areas. The second part (3 CCR sections 6452.2 and 6452.3) provides a contingency mechanism to limit VOC emissions from field fumigant applications in the Ventura nonattainment area. The third part (3 CCR section 6452.4) requires CDPR to annually report on pesticide VOC emissions in each of the five nonattainment areas and establishes requirements for the report. The fourth part (3 CCR sections 6624 and 6626) establishes the recordkeeping and reporting requirements necessary to ensure compliance with the other parts. We describe each part in more detail below.

The first part (3 CCR sections 6447 through 6452) establishes, by fumigant and method, requirements for the field application of seven fumigants and restricts the use of certain higher-emitting application methods in the South Coast, SED, Ventura, SJV, and Sacramento Metro ozone nonattainment areas during the period May 1 to October 31.⁸ Requirements are described for the field fumigants: methyl bromide (sections 6447 and 6447.3), 1,3-dichloropropene (sections 6448 and 6448.1), chloropicrin (sections 6449 and 6449.1), metam-sodium, potassium N-methyldithiocarbamate and dazomet (sections 6450, 6450.1 and 6450.2), and sodium tetrathiocarbonate (sections 6451 and 6451.1).

Specific requirements for applying these fumigants include, for example, limiting fumigant application rates (pounds/acre); specifying application methods (e.g., minimum injection depth below soil surface, number of water treatments, minimum hours to leave tarpaulin in place); and requiring plans to address damaged tarpaulins. 3 CCR section 6452

⁸ CDPR's regulations establishing the parameters for field fumigant application methods (but not the restrictions on which methods may be used during certain periods of the year) apply statewide; however, EPA is limiting its approval to just the five listed nonattainment areas.

allows CDPR to approve alternative fumigation methods under certain conditions and based on specific criteria.

As submitted, the second part of CDPR's regulations (3 CCR sections 6452.2 and 6452.3) apply only to the Ventura ozone nonattainment area. This part requires CDPR to set a field fumigant VOC emissions limit for Ventura in its annual VOC emissions inventory report if overall pesticide emissions (not just fumigant emissions) in the Ventura nonattainment area are found to be within five percent of or exceed the listed benchmark. The benchmark is equivalent to the 20 percent reduction in pesticide VOC emissions from 1990 emissions levels that is required in the area by the California SIP Pesticide Element. This part further requires that the county agricultural commissioner add conditions to field fumigation permits or take other actions that will prevent the field fumigant limit from being exceeded.

The third part of the submitted regulations (3 CCR section 6452.4) requires CDPR to issue an annual emissions inventory report that reports the total agricultural and commercial structural (fumigant and nonfumigant) pesticide VOC emissions for previous years in each of the five nonattainment areas and evaluates compliance with the emissions reduction targets in each area. This section specifies the method for calculating emissions and requires CDPR make a draft emissions inventory available to the public for a 45-day comment period and post the final report on its website.

The fourth part of the submitted regulations (3 CCR sections 6624 and 6626) establishes the pesticide use recordkeeping and reporting requirements needed to assure compliance with the other parts. This part requires anyone using pesticides in specific applications to keep and maintain certain records for two years and requires operators of property that produces an agricultural commodity and agricultural pest control businesses to report the use of pesticides to

the county agricultural commissioner. These sections require the recording and reporting of the method for fumigant application in the five nonattainment areas.

CDPR has revised its commitments in the 1994 Pesticide Element to limit VOC emissions from agricultural and commercial structural pesticides in the SJV. Specifically, it is now committing to

- use a specified emissions estimation methodology to establish the 1990 pesticide VOC emission levels and evaluate compliance with the provisions in the 1994 Pesticide Element for SJV;
- implement restrictions on agricultural fumigation methods and by 2014 implement restrictions on VOC emissions from non-fumigant pesticides; and
- manage VOC emissions from agricultural and commercial structural pesticide use to ensure that they do not exceed 18.1 tons-per-day in the SJV area (which is equivalent to a 12 percent reduction in pesticide VOC emissions from 1990 levels).

III. EPA's Evaluation of the Revisions to the California SIP Pesticide Element

A. CAA Procedural and Administrative Requirements for SIP Submittals under CAA Section 110

CAA sections 110(a)(1) and (2) and 110(l) require a state to provide reasonable public notice and opportunity for public hearing prior to the adoption and submittal of a SIP or SIP revision. To meet this requirement, every SIP submittal should include evidence that adequate public notice was given and an opportunity for a public hearing was provided consistent with EPA's implementing regulations in 40 CFR 51.102. All three submittals under consideration here included evidence of adequate public notice and opportunity for comment.

CAA section 110(k)(1)(B) requires EPA to determine whether a SIP submittal is complete within 60 days of receipt. This section also provides that any SIP submittal that we

have not affirmatively determined to be complete or incomplete will become complete by operation of law six months after the day of submittal. The October 12, 2009 submittals of the CDPR's regulations and the revised SJV Pesticide Element went complete by operation of law on April 12, 2009. The August 2, 2011 submittal of revisions to CDPR's regulations went complete by operation of law on February 2, 2012.

B. Enforceability of Emission Limitations under CAA Section 110(a)(2)(A)

CAA section 110(a)(2)(A) requires that SIP "shall include enforceable emissions limitations, and such other control measures, means or techniques (...) as well as schedules and timetables for compliance, as may be necessary or appropriate for attainment..."

In order to be enforceable, SIP regulations and commitments must be clear regarding, for example, who must comply, by what date, the standard of compliance, the methods used to determine compliance, and the process and criteria for obtaining any variation from the normal mode of compliance.⁹ Guidance used to help evaluate enforceability includes the Bluebook and the Little Bluebook.¹⁰

Field Fumigant Regulations

CDPR's regulations include recordkeeping requirements in 3 CCR section 6624 (Pesticide Use Records) and the reporting requirements in 3 CCR section 6626 (Pesticide Use Reports for Production Agriculture). Among these recordkeeping and reporting requirements is

⁹ "Review of State Implementations Plans and Revisions for Enforceability and Legal Sufficiency" (Enforceability Guidance), Craig Potter, EPA, September 23, 1987. *See also* General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990. 57 FR 13498, 13502 and 13541 (April 16, 1992) and CAA sections 110(a)(2) and 172(c)(6). <http://www.epa.gov/compliance/resources/policies/civil/caa/stationary/review-enf-rpt.pdf>.

¹⁰ "Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations," U.S. EPA, OAQPS, May 25, 1988 ("the Bluebook") and "Guidance Document for Correcting Common VOC and Other Rule Deficiencies," U.S. EPA Region 9, August 21, 2001 ("the Little Bluebook").

the provision that require any person who uses a fumigant in any of the five ozone nonattainment areas to record and report a description of the application method. See 3 CCR sections 6624(f) and 6626(d). The regulations provide specific methods, limits, and timeframes for agricultural use of each fumigant. The regulations provide a process and criteria for use of a field fumigation method not described in the regulations. The request to implement a method not described in the regulations must be accompanied by scientific data documenting the VOC emissions, and that the method will not result in emissions greater than any one of the methods allowed for use by the regulations. The director must consider criteria such as data sufficiency and validity, and representativeness of field conditions studied. *See* 3 CCR section 6452.

The recordkeeping and report requirements and other rule provisions in the submitted regulations are clear and adequate to ensure that California's submitted fumigant regulations is enforceable as required by of CAA section 110(a)(2)(A).

Pesticide Emission Reduction Commitment for the San Joaquin Valley

The mechanism to track compliance with the 18.1 tpd limit on VOC emissions from agricultural and commercial structural pesticides in SJV is the Annual VOC Emissions Inventory Report required by 3 CCR section 6452.4. (Annual Volatile Organic Compound Emissions Inventory Report). For tracking compliance with the overall VOC limit in the SJV, CDPR proposes to use the emissions estimation methodology described on page 2-4 (in the section "Procedure for Calculating Unadjusted and Adjusted Volatile Organic Compound Emissions") of November 5, 2008 memorandum from Rosemary Neal, CDPR to Randy Segawa, CDPR, Subject: Update to the Pesticide Volatile Organic Inventory; Estimated Emissions 1990-2006,

and Preliminary Estimates for 2007 (“Neal memorandum”).¹¹ Procedures for calculating pesticide VOC emissions are also in 3 CCR section 6452.4(a)(1).¹² The Neal memorandum lays out a calculation process that follows standard inventorying practice and provides the same procedures for calculating VOC emissions as 3 CCR section 6452.4(a)(1). Pesticide usage rates used to calculate total emissions are collected from pesticide use reports which are required by 3 CCR section 6626 and the requirements for persons (e.g., pesticide applicators) to keep and report the data necessary for preparing the annual report are in 3 CCR section 6624. These provisions are clear and adequate in combination with the fumigant regulations to ensure the pesticide VOC limit for the SJV is enforceable as required by CAA section 110(a)(2)(A).

CDPR has committed to implement restrictions on VOC emissions from non-fumigant regulations by 2014 which we interpret to mean by no later than May 1, 2014 given that CDPR projects emissions reductions from these restrictions in 2014 and its control program operates from May 1 to October 31 of each year. *See* “Proposed SIP Commitment for San Joaquin Valley,” page 2. To achieve reductions in 2014, the restriction would need to be implemented by the beginning of the regulatory season (May 1) in that year. CDPR does not commit to a specific emissions reduction from the additional restrictions on non-fumigant pesticide; however, the restrictions are part of CDPR’s regulatory program to ensure that the inventory target of 18.1 tpd in the SJV is not exceeded (*Id.* at page 1), which effectively defines the needed stringency. This commitment is sufficiently clear and adequate to ensure that is enforceable as required by CAA section 110(a)(1)(A).

¹¹ The Neal memorandum was included as part of October 12, 2009 submittal of the “Pesticide Emission Reduction Commitment for the San Joaquin Valley” and we intend to include it as additional material in the California SIP should we finalize our proposed approval of CDPR’s commitment.

¹² These procedures apply not only to SJV but also to the other four nonattainment areas.

C. Reasonably Available Control Measures/Reasonably Available Control Technology (RACM/RACT) Requirement under CAA Sections 172(c)(1) and 182(b)(1)

CAA section 172(c)(1) requires that each attainment plan “provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology), and shall provide for attainment of the national primary ambient air quality standards.” RACM is a requirement only for nonattainment areas.

EPA defines RACM as any potential control measure for application to point, area, on-road and non-road emissions source categories that meets certain criteria. These criteria include whether the measure is technologically and economically feasible and either individually or collectively with other RACM can advance the attainment date by at least one year. *See* 57 FR 13498, 13560 (April 16, 1992). The determination as to whether a SIP provides for the implementation of RACM as required by CAA section 172(c)(1) is done as part of an area’s attainment and reasonable further progress plans and not on a rule-by-rule basis.

For ozone nonattainment areas classified as moderate or above, CAA section 182(b)(2) requires the implementation of reasonably available control technologies (RACT) on all major sources of VOC¹³ and for each VOC source category for which EPA has issued a Control Techniques Guideline (CTG). CAA section 182(f) requires that RACT under section 182(b)(2) also apply to major stationary sources of NO_x. *See* CAA sections 182(d) and (f).

¹³ In areas classified as severe (such as SED, Ventura, and Sacramento Metro), a major source is a stationary source that emits or has the potential to emit at least 25 tons of VOC or NO_x per year. *See* CAA sections 182(d) and (f). For extreme areas (South Coast and SJV), a major stationary sources is one that emits or has the potential to emit at least 10 tons of VOC or NO_x per year. *See* CAA sections 182(e) and (f).

The proposed revisions to the California SIP Pesticide Element that we are evaluating here are intended to reduce VOC emissions in the South Coast, SED, Ventura, SJV, and Sacramento Metro ozone nonattainment areas. VOC emissions contribute to the formation of ozone and secondary particulate matter. EPA, though, has determined by rule that states do not need to address controls for sources of VOC emissions for PM_{2.5} standard attainment unless the state and/or EPA make a technical demonstration that such controls would significantly contribute to reducing PM_{2.5} concentrations in the nonattainment area. *See* 40 CFR 51.1002(c)(3). Such a determination would be made in the context of each area's plan for attainment of the PM_{2.5} standards. Of the areas subject to the California SIP Pesticide Element, only the South Coast, SJV, and Sacramento Metro areas are nonattainment for one or more of the PM_{2.5} standards and only South Coast controls VOC for PM_{2.5} attainment.

Field Fumigant Regulations

CARB's 2009 submittal of the field fumigant regulations did not include a demonstration of how the field fumigation methods implement RACT.¹⁴ In response to EPA comments, CDPR provided a document containing more detailed information on its RACT evaluation of fumigation methods.¹⁵ This document contains a general discussion of strategies for controlling VOC emissions from fumigants and an evaluation of field fumigation method options, including the basis for those accepted and those rejected by CDPR for inclusion in its regulations. It discusses current research on fumigant VOC emission reduction methods, including a

¹⁴ *See* letter, Andrew Steckel, EPA Region 9 to Frank Spurlock, CDPR and Mike Guzzetta, CARB, November 2, 2010.

¹⁵ *See* letter and attachments, Randy Segawa, CDPR to Andrew Steckel, EPA-Region 9, Reducing Volatile Organic Compound Emissions from Pesticides: Analysis of Alternatives for Field Fumigation Methods, June 28, 2011.

reevaluation of fumigants to obtain additional data to replace surrogate data used in developing the adopted regulations.

Field fumigation emissions are considered fugitive emissions because they are emissions that “could not reasonably pass through a stack, chimney, vent, or other functionally-equivalent opening.”¹⁶ As noted above, CAA section 182(b)(1) requires RACT be applied to all to major stationary sources in a ozone nonattainment area classified moderate or above. EPA has not yet defined by rule whether fugitive emissions must be included in determination of major source status for the purposes determining the application of section 182(b)(1) RACT requirement; however, EPA believes, based on the information provided in the CDPR’s alternatives analysis, and the research cited to support it, that CDPR has demonstrated that the proposed regulations are stringent enough to implement RACT-level controls on the application of pesticides.

On January 10, 2012, EPA partially approved and partially disapproved the section 182(b)(1) RACT SIP submitted by California on June 18, 2009 for the SJV ozone nonattainment area. The partial disapproval was based in part on our conclusion that the State had not fully satisfied CAA section 182(b) RACT requirements for the application of fumigants. *See* 77 FR 1417, 1425 (January 10, 2012). Based on our proposed finding here that CDPR’s field fumigant regulations provide RACT-level controls on this source category, final approval of these regulations would satisfy California's obligation to implement RACT under CAA section 182(b)(1) for this source category for the 1-hour ozone and 1997 8-hour ozone standards for the SJV RACT SIP.

EPA has recently approved the attainment, RFP and RACM demonstrations in the 8-hour ozone SIPs for the South Coast and San Joaquin Valley and the PM_{2.5} SIP for the South Coast

¹⁶ *See* 40 CFR 70.2 (Definitions).

(which did include VOC reductions in its RFP and attainment demonstrations).¹⁷ These demonstrations relied in part on VOC control measures in the 2007 State Strategy; however, EPA's approval of these demonstrations did not rely on emissions reductions from CDPR's field fumigant regulations. Therefore, their approval into the SIP is consistent with the approved RACM demonstrations.

CARB has submitted SIPs to address attainment of the 1997 8-hour ozone standard in the SED, Ventura County, and Sacramento Metro nonattainment. EPA has not yet acted on these plans although we note that none rely on reductions from controls on pesticides.

Pesticide Emission Reduction Commitment for the San Joaquin Valley

As noted above, the demonstration that a SIP provides for the implementation of RACM as required by CAA section 172(c)(1) is done as part of an area's attainment and reasonable further progress plans and not on an individual rule or commitment basis.

EPA recently approved the 2007 8-hour ozone SIP for the San Joaquin Valley, including the SIP's RACM demonstration. 77 FR 12652 (March 1, 2012). To demonstrate that the SIP provided for RACM, California relied in part on measures in the 2007 State Strategy, including the "Pesticide Emission Reduction Commitment for the San Joaquin Valley" (as revised April 17, 2009) that we are proposing to approve here. However, because we had not yet approved the commitment into the SIP, we did not grant any emissions reductions credit to the commitment in either the RFP or attainment demonstration nor did we rely on it to make our determination that

¹⁷ See 76 FR 69928 (November 9, 2011) (South Coast PM_{2.5} Plan), 77 FR 12652 (March 1, 2012) (SJV 2007 8-hour Ozone SIP), and 77 FR 12674 (March 1, 2012) (South Coast 8-hour Ozone Plan). EPA has also recently approved the SJV 2008 PM_{2.5} SIP which relied in part on measures in the 2007 State Strategy. In approving that SIP, EPA concurred with the State's determination that VOC did not need to be controlled for PM_{2.5} attainment in the SJV and therefore the plan did not need to evaluate VOC control measures as part of its RACM demonstration. See 76 FR 69896, 69924 (November 9, 2011). The PM_{2.5} plan for the Sacramento Metro area is not due until late 2012.

the 2007 SIP provided for RACM. *See* Air Division, EPA Region 9, “Final Technical Support Document and Response to Comments Final Rule on the San Joaquin Valley 2007 Ozone Plan and the San Joaquin Valley Portions of the 2007 State Strategy,” December 15, 2011, p. 51-57. Because EPA’s approvals of the attainment, RFP, and RACM demonstrations in the SJV 2007 8-hour ozone SIP did not rely on emissions reductions from CDPR’s commitment to limit pesticide VOC emissions in the SJV to 18.1 tpd, its approval into the SIP is consistent with the approved RACM demonstration.

D. Finding of Non-Interference With Applicable Requirements of the CAA Under Section 110(l)

Revisions to the SIP, including revisions to SIP-approved control measure, must meet the requirements of CAA section 110(l) to be approved by EPA. CAA section 110(l) “Plan Revisions” provides in relevant part:

“The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in [section 171]) or any other applicable requirement of [the CAA].”

We interpret section 110(l) to apply to all requirements of the CAA and to all areas of the country, whether attainment, nonattainment, unclassifiable, or maintenance for one or more of the six criteria pollutants. We also interpret section 110(l) to require a demonstration addressing all pollutants whose emissions and/or ambient concentrations may change as a result of the SIP revision. The scope and rigor of an adequate section 110(l) demonstration of noninterference depends on the air quality status of the area, the potential impact of the revision on air quality, the pollutant(s) affected, and the nature of the applicable CAA requirements.

In reviewing a modification to an approved SIP provision, we look to see to what extent the existing SIP has relied on that provision to meet applicable CAA requirements. For emissions reduction measures, we generally conclude that the revision will not interfere with any applicable requirement related to attainment or RFP if the revised SIP will provide the same or more emissions reductions on the same or similar schedule as the existing SIP. We note, however, that CAA section 110(l) does not bar approval of SIP revisions that may result in higher levels of emissions than would potentially occur under the unrevised SIP; only that such revisions do not result in the applicable SIP no longer providing for expeditious attainment or RFP or complying with any other applicable requirements of the CAA.

The submittals that we are evaluating in this proposal for inclusion into the California SIP control VOC emissions in five California areas. Neither the field fumigant regulations nor the SJV pesticide SIP commitment explicitly regulated any other pollutant besides VOC. VOC is a precursor pollutant for ozone as well as for both fine (PM_{2.5}) and coarse (PM₁₀) particulate matter.¹⁸ At this time, only the South Coast's SIP relies on VOC controls for PM_{2.5} or PM₁₀ attainment and none of its adopted particulate matter plans rely on reductions from the California SIP Pesticide Element (either as already approved or proposed for approval here) to demonstrate attainment, RFP, or RACM or to meet any other requirement of the CAA.

Field Fumigant Regulations

The CDPR's field fumigant regulations are the first such regulations incorporated into the California SIP. Their approval will strengthen the SIP by providing SIP-enforceable measures and compliance procedures to reduce emissions from the application of fumigants in the five

¹⁸ As noted previously, while EPA considers VOC to be a precursor to PM, it does not require control of VOC emissions for PM standard attainment in most instances. *See* 72 FR 20586, 20589 (April 25, 2007) and 57 FR 13498, 13538 (April 16, 1992).

ozone nonattainment areas covered by the regulations. Their approval will also aid compliance with the approved California SIP Pesticide Element's provisions for reducing VOC emissions by 20 percent from 1990 baseline levels in the South Coast, SED, Ventura, and Sacramento Metro ozone nonattainment areas. Their approval will also aid compliance with the proposed 18.1 tpd limit on pesticide VOC emissions in the San Joaquin Valley. Therefore, EPA proposes to find that approving the field fumigant regulations into the California SIP will not interfere with any applicable requirement concerning attainment and reasonable further progress or with any other applicable requirement of the CAA.

Pesticide Emission Reduction Commitment for the San Joaquin Valley

In 1997, EPA approved the 1994 Pesticide Element into the California SIP. *See* 62 FR 1150, 1170 (January 8, 1997). As approved, the Element's goal was to reduce VOC emissions from agricultural and commercial structural pesticide applications by a maximum of 20 percent from the 1990 baseline emission inventory by 2005 in areas that relied on VOC reductions from pesticides in their attainments plans with reductions to occur linearly from 1990 to 2005 but it allowed for less than 20 percent if fewer VOC reductions from pesticide were needed. *See* "The State Implementation Plan for Agricultural and Commercial Structural Pesticides," November 15, 1994 ("1994 Pesticide SIP"), p. 1.¹⁹

The attainment demonstration for the SJV in the 1994 Ozone SIP relied in part on reductions of 12 percent from 1990 emissions levels from the 1994 Pesticide Element to

¹⁹ As submitted, the 1994 Pesticide Element consisted of three documents: the 1994 Pesticide SIP and the memorandum from James W. Wells, Director, CDPR, to James D. Boyd, Executive Officer, CARB, May 9, 1995 ("Wells memorandum") and the letter from James D. Boyd, Executive Officer, CARB, to David Howekamp, Division Director, EPA-Region 9, June 13, 1996 ("Boyd Letter"). As approved, it consisted of the 1994 Pesticide SIP (40 CFR 52.220(c)(204)(i)(A)(6)) and the Boyd letter (40 CFR 52.220(c)(236)). *See* section IV of this preamble for further discussion of the 1994 Pesticide Element.

demonstrate attainment by the area's then-applicable attainment deadline of November 15, 1999.

In approving the 1994 Pesticide Element and the SJV ozone attainment demonstration, EPA credited the element with 13 tpd (in 1994 SIP currency²⁰) in VOC emissions reductions in 1999.²¹ At the same time, EPA noted that California had committed to adopt and submit any regulations necessary to reduce VOC emissions from agricultural and commercial structural pesticides by 12 percent in 1999²² in SJV. *See* 61 FR 10920, 10935 (March 18, 1996).

In 2003, CARB updated the strategy that was part of the 1994 Ozone SIP. One of the measures in the 2003 State Strategy was PEST-1 ("Implement Existing Pesticide Strategy"), which retained the provisions of the 1994 Pesticide Element. In 2004, CARB submitted the 2004 Extreme [1-hour Ozone] Attainment Plan for the SJV²³ which relied in part on the 2003 State Strategy for the reductions needed to demonstrate attainment by SJV's new applicable attainment

²⁰ A SIP's "currency" is the emissions inventory on which it is based. An emissions reduction expressed in a particular "SIP currency" is an emissions reduction calculated using the inventory included in that SIP. Because inventories vary from SIP to SIP for reasons unrelated to controls (e.g., improved activity estimates or emissions factors), the estimated emissions reductions from a control measure in tons per day can change from SIP to SIP even if the effectiveness of the control measure as a percentage of the emissions category does not.

²¹ The 13 tpd figure was provided by CARB on page A-2 and in Attachment C of the Boyd Letter. For the 1994 Ozone SIP, the State estimated that VOC emissions from pesticide use in 1990 in the San Joaquin Valley were 62.5 tpd. A 12 percent reduction from this level would require reducing overall pesticide emissions to be no more than 55.0 tpd in 1999. The State further estimated that without controls, VOC emissions from pesticides in the SJV would increase to 67.9 tpd by 1999, thereby requiring a reduction of 12.9 tpd (67.9 tpd minus 55.0 tpd, rounded to 13 tpd) in 1999 in order to meet the target level for a 12 percent reduction. *See* CDPH, *Staff Report on the Department of Pesticide Regulation's Proposed SIP Commitment for San Joaquin Valley*, undated, p. 1, fn 1.

²² A 20 percent reduction that was to occur linearly over the fifteen years between 1990 and 2005 would accrue reductions at a rate of 1.33 percent per year (20 percent divided by 15 years) resulting in a 12 percent reduction by 1999 (9 years times 1.33 percent per year).

²³ San Joaquin Valley Air Pollution Control District, "Extreme Ozone Attainment Demonstration Plan" adopted October 8, 2004; amended October 20, 2005 and August 21, 2008.

date of November 15, 2010. On page 27 of its staff report for that plan,²⁴ CARB discusses the measures in the 2003 State Strategy including PEST-1. It describes the measure as a “[c]ontinuation of the Department of Pesticide Regulation’s approved SIP obligation to reduce volatile emissions from pesticides [which f]or the San Joaquin Valley ... means a pesticide VOC emissions target of 12 percent less than 1990 levels.”

EPA approved PEST-1 into the SIP as part of its action to approve in part and disapprove in part the 2003 South Coast AQMP. *See* 74 FR 10176 (March 10, 2009), codified at 40 CFR 52.220(c)(ii)(A)(1). We have not approved any other changes to the SJV-related provisions of 1994 Pesticide Element nor have we granted any emissions reductions credit for the 1994 Pesticide Element beyond the 13 tpd (in 1994 SIP currency) approved as part of our action on the 1994 Ozone SIP.²⁵

California is now proposing to revise its SIP Pesticide Element for the SJV to replace the requirement to achieve a percent reduction in VOC emissions from pesticides with a limit on overall VOC emissions from pesticides in the SJV of 18.1 tpd of VOC during the high ozone season of May 1 to October 31. The 18.1 tpd cap equates to a reduction of 12 percent from the current estimate of 1990 pesticide VOC emissions levels in the SJV.²⁶

²⁴ CARB, *Staff Report, Proposed 2004 State Implementation Plan For Ozone In The San Joaquin Valley*, Release Date: September 28, 2004.

²⁵ We have approved two ozone plans for the SJV since the 1997: the 2004 Ozone Plan in 2010 and the second, the 2007 8-hour Ozone Plan in 2012. *See* 75 FR 10420 (March 8, 2010) and 77 FR 12652 (March 1, 2012). Neither plan nor our approval of them relied on reductions in pesticide emissions to meet any applicable CAA requirement.

²⁶ *See* CDPR, *Staff Report on the Department of Pesticide Regulation’s Proposed SIP Commitment for San Joaquin Valley*,” undated (enclosure 2 to memorandum, Christopher W. Reardon, Chief Deputy Director, CDPR, to James Goldstene, Executive Officer, CARB, October 5, 2009; subject: Amendments to the Pesticide Element of the Ozone State Implementation Plan).

Based on our review of the proposed revision, we find that the revision will result in, at minimum, the same emissions reductions that are currently required by the approved SIP and will not delay those reductions given that the limit is currently effective. We, therefore, propose to find that approving CDPR's commitment to manage VOC emissions from agricultural and commercial structural pesticide use to ensure that they do not exceed 18.1 tpd in the SJV area into the California SIP will not interfere with any requirement concerning attainment and reasonable further progress or any other applicable requirement of the CAA.

In comments that EPA received on its proposed approval of the SJV 2004 Extreme Ozone Attainment Plan (74 FR 33933(July 14, 2009)), several non-governmental organizations argued that the 1994 Pesticide Element requires a 20 percent reduction in VOC emissions from 1990 levels by 2005 in the SJV citing to the Boyd letter on page A-2.²⁷

In the Boyd letter, CARB provided EPA with suggested revisions to our March 18, 1996 (61 FR 10920, 10935) proposed approval of the 1994 Ozone SIP. In reference to the 1994 Pesticide Element, CARB stated that the "commitment is for a 20% reduction from 1990 levels by 2005 in each SIP area, except [San Diego]. [CARB] only took credit in the attainment year: SJV 1999 = 12%; Sac 2005 = 20%; Ven 2005 = 20%; SED 2007 = 20%; SC 2010 = 20%." EPA does not find the "commitment is for a 20% reduction" statement determinative as to the State's commitment for SJV, not only because it is immediately contradicted by the statement that a 12 percent credit was taken only in the attainment year of 1999 but also because it is not entirely consistent with the more extensive language describing the emissions reductions target in other

²⁷ See letter, Brent Newell, Legal Director, Center on Race, Poverty & the Environment, August 31, 2009, "Comments on Approval and Promulgation of Implementation Plans: 1-Hour Ozone Extreme Area Plan for San Joaquin Valley, CA (Docket No. EPA-R09-OAR-2008-0693)," pp. 16-20.

parts of the approved 1994 Pesticide Element and does not reflect the reductions relied on in the SIP.

The 1994 Pesticide Element committed CDPR to a “maximum of 20 percent” reduction in pesticide VOC emissions from 1990 baseline levels in areas “which reference VOC reductions” from the element in their plans. *See* 1994 Pesticide SIP, p. 1. With this language, the percent reduction required in an area is tied to the emissions reductions referenced, that is, relied on, in that area’s plan. As approved, the 1994 Pesticide Element also allowed for reductions of less than 20 percent if fewer VOC reductions from pesticide were needed. *Id.* As noted above, the reductions relied on in the 1994 Ozone SIP in its attainment demonstration for SJV in 1999 were 13 tpd (in 1994 SIP currency) which equates to 12 percent reduction from 1990 baseline in 1999 (when anticipated growth in pesticide VOC emissions between 1990 and 1999 is excluded) and no additional reductions have been relied on in any SIP for SJV subsequent to the 1994 one.

Approval of the revised “Pesticide Emission Reduction Commitment for the San Joaquin Valley” (submitted in 2009) will not interfere with any applicable requirement related to attainment or reasonable further progress for any PM_{2.5} or PM₁₀ standard in the SJV. EPA has determined that VOC controls are not required for particulate matter control in the SJV. *See* 72 FR 20586, 20589 (April 25, 2007), 69 FR 30006, 30007 (May 26, 2004), and 76 FR 69896, 69924 (November 9, 2011).

Additional information on EPA’s determination under CAA section 110(l) can be found in section II.D. of the TSD for this proposal.

IV. Response to Remand in *Association of Irrigated Residents* Case

In this section, we discuss why EPA believes that our proposed approval of the fumigant regulations and commitment for the SJV obviate the need to rescind or modify EPA’s previous

approvals of the California SIP Pesticide Element notwithstanding the deficiencies in the 1994 Pesticide Element that have been brought to light by subsequent litigation. In so doing, we summarize the relevant background that provides the context for this explanation.

In 1994, California submitted the 1994 Pesticide SIP as part of its comprehensive 1994 Ozone SIP. The 1994 Pesticide SIP set forth the goal of reducing VOC emissions from pesticide use by as much as 20 percent from 1990 levels as needed in those areas of California that relied on emissions reductions from pesticides to meet CAA requirements for attainment of the 1-hour ozone standard. The 1994 Pesticide SIP included a process for re-evaluation of pesticide products (to refine emissions estimates and to review for possible restrictions on use), for establishing the 1990 base year inventory and for tracking emissions, for reducing VOC emissions from pesticide use through voluntary changes in pest management practices, and for developing additional regulatory measures to ensure that reductions are achieved.

Upon review of the 1994 Pesticide SIP, EPA identified certain completeness and approvability issues and requested clarification. *See* letters, David P. Howekamp, Director, Air and Toxics Division, EPA Region 9 to James W. Wells, Director, CDPR, March 20, 1995 and April 21, 1995. CDPR responded to EPA's request with a clarification of the 1994 Pesticide SIP that established a commitment on the part of CDPR "to adopt and submit to U.S. EPA by June 15, 1997, any regulations necessary to reduce [VOC] emissions from agricultural and commercial structural pesticides by specific percentages of the 1990 base year emissions, by specific years, and in specific nonattainment areas," as listed in a table showing percent reductions of 8, 12, 16, and 20 percent by 1996, 1999, 2002, and 2005, respectively, in the following nonattainment areas: South Coast, Southeast Desert, Ventura, San Joaquin Valley, and Sacramento Metro. *See* letter, James W. Wells, Director, CDPR, to David P. Howekamp, EPA

Region 9, March 31, 1995; the Wells memorandum; and the related transmittal letter for the Wells memorandum from James D. Boyd, Executive Officer, CARB to Felicia Marcus, Regional Administrator, EPA Region 9, May 11, 1995.

In March 1996, EPA proposed to approve the 1994 Pesticide Element, among other elements of the 1994 Ozone SIP and did so based in part on the clarification provided by CDPR through the Wells memorandum. *See* 61 FR 10920, 10935-10936 (March 18, 1996). In response to EPA's proposed rule, CARB submitted a letter stating: "In the pesticide element of the SIP, the [CDPR] projected a steady decline in volatile emissions from pesticides between 1996 and 2005. However, California took SIP credit for these reductions only in the applicable attainment year for the San Joaquin Valley, Sacramento Region, Ventura County, the Southeast Desert, and the South Coast. The notice should reflect this information." *See* letter, James M. Strock, Secretary for Environmental Protection, California Environmental Protection Agency, to Felicia Marcus, Regional Administrator, EPA Region 9, May 2, 1996. CARB subsequently submitted the Boyd Letter providing additional detail that was intended to supplement the technical corrections identified in the State's formal May 2 comment letter. Through the Boyd Letter, CARB clarified again that CDPR's commitment was for a 20 percent reduction from 1990 levels by 2005 in the five specified nonattainment area but also noted that CARB only took credit in the attainment year, which CARB specified as a 12 percent reduction by 1999 in San Joaquin Valley, and 20 percent reduction in the attainment years for the four other nonattainment areas.²⁸

²⁸ At the time of EPA's action on the 1994 California Ozone SIP and related 1994 Pesticide Element, the SJV was classified as a "serious" nonattainment area for the 1-hour ozone standard with an applicable attainment date of 1999. *See* 61 FR 10920, 10925. Years after approval of the 1994 SIP, the SJV was reclassified as "severe" and then "extreme" for the 1-hour ozone standard. *See* 66 FR 56476 (November 8, 2001) and 69 FR 20550 (April 16, 2004). The other four areas were classified as "severe" or "extreme" with later attainment dates at the time of EPA's action on the ozone SIP and Pesticide Element.

In 1997, EPA took final action to approve the 1994 Pesticide Element, and most of the 1994 California Ozone SIP and again referred to the Wells memorandum as providing the clarification necessary to provide EPA with the basis to approve the 1994 Pesticide Element as meeting the applicable requirements for enforceability of SIP revisions. *See* 62 FR 1150, 1169-1170 (January 8, 1997). However, in the 1997 final rule, EPA referred explicitly to California's request in its May 2, 1996 comment letter to exclude emissions reductions for interim years from the SIP, and also implicitly referred to the Boyd Letter by citing CARB's decision not to assign credit to the pesticides measure except for purposes of attainment. In the final rule, we tried to reconcile the Wells memorandum with California's comment letter and the Boyd letter and summarized what we believed the Pesticide Element to contain with respect to regulatory measures, as follows: "As described in the SIP, California has committed to adopt and submit to U.S. EPA by June 15, 1997, any regulations necessary to reduce VOC emissions from agricultural and commercial structural pesticides by 20 percent of the 1990 base year emissions in the attainment years for Sacramento, Ventura, Southeast Desert, and the South Coast, and by 12 percent in 1999 for the San Joaquin Valley." *Id.* at 1170.

In listing the specific portions of the 1994 Ozone SIP and related documents that we were approving and incorporating as part of the California SIP in our 1997 final action, we listed CDPR's 1994 Pesticide SIP and the Boyd Letter, but did not list the Wells memorandum. While EPA's failure to approve and incorporate the Wells memorandum into the SIP may have been inadvertent, California's May 2, 1996 comment letter and the Boyd Letter made such approval and incorporation (i.e., without modification) problematic because the Wells memorandum contained interim year emissions reduction commitments that the California comment letter and Boyd Letter specifically excluded.

In the mid-2000's, several community groups sued CDPR under the CAA for failure to adopt and submit regulations ensuring VOC emissions reductions from pesticide use in Ventura County based on the commitments set forth in the Wells memorandum. Upon review of the record, the Ninth Circuit Court of Appeals in effect denied the community group the remedy that the group sought based on the court's determination that the Wells memorandum was not in fact approved into the California SIP and thus the commitment by CDPR to adopt and submit regulations as set forth in the Wells memorandum was not enforceable under the Act. *See El Comité para el Bienestar de Earlimart v. Warmerdam*, 539 F.3d 1062 (9th Cir. 2008) (*Warmerdam*). In the wake of the *Warmerdam* decision, the community group filed a petition for review in the Ninth Circuit challenging EPA's 1997 approval of the 1994 Ozone SIP on the grounds that, without the Wells memorandum, EPA's approval of that SIP was arbitrary and capricious because it relied on unenforceable emissions reductions from the 1994 Pesticide Element. *See El Comité para el Bienestar de Earlimart v. EPA*, No. 08-74340 ("*El Comité*"). The Ninth Circuit has not issued its decision in the *El Comité* case against EPA's approval of the 1994 Ozone SIP.

Meanwhile, in 2004, California resubmitted the 1994 Pesticide Element to EPA as part of the 2003 State Strategy, which was originally intended to replace the state measures portion of the 1994 California Ozone SIP in the California SIP, in the form of a control measure referred to as "PEST-1." PEST-1 was simply a continuation of the original 1994 Pesticide Element. In 2009, we approved PEST-1 as part of our approval of the 2003 State Strategy reasoning that approval or disapproval of PEST-1 amounted to the same thing from the standpoint of the California SIP, namely the 1994 Pesticide Element. *See* 74 FR 10176 (March 10, 2009). EPA's approval of PEST-1 was challenged and the Ninth Circuit disagreed with EPA's decision that approval or

disapproval of PEST-1 amounted to the same thing and remanded the approval of PEST-1 back to EPA for an evaluation of the Pesticide Element for enforceability. *See Association of Irrigated Residents v. EPA*, 632 F.3d 584 (9th Cir. 2011), revised January 27, 2012 (*AIR*). Specifically, the Ninth Circuit held, given its earlier finding in the *Warmerdam* case that the Wells memorandum was not approved and incorporated into the California SIP, that EPA must determine whether the approved 1994 Pesticide Element has sufficient enforcement mechanisms to satisfy the requirements of the CAA. In light of the decision in *AIR*, EPA filed a supplemental brief that argues that the decision in the *AIR* case makes the *El Comité* case moot on the grounds that the relief granted in the *AIR* case with respect to PEST-1 amounts to the same relief that the petitioner could gain by a favorable decision in the *El Comité* case, namely re-evaluation of the Pesticide Element for enforceability. The petitioners in the *El Comité* disagree that the *AIR* decision has made the *El Comité* case moot, and the Ninth Circuit has not yet issued its decision in the *El Comité* case.

In light of the remand in the *AIR* case and with due consideration to the history summarized above, we must re-evaluate the enforceability of the 1994 Pesticide Element recognizing that the Wells memorandum is not approved into the SIP and take appropriate remedial actions if the element (without the Wells memorandum) does not meet the minimum requirements for enforceability under the CAA. We are using this proposed rule on the submitted fumigant regulations and revised SIP commitment for the SJV as the opportunity to present our re-evaluation and to explain our rationale for taking no action to rescind or modify our approvals of the 1994 Pesticide Element in 1997 and again (as PEST-1) in 2009.

First, we recognize that the 1994 Pesticide Element is a “committal” measure rather than a “control” measure. That is, the 1994 Pesticide Element constitutes a measure for which the

State does not provide regulations (or equivalent enforceable mechanism) in support of the emissions reductions credited to the measure at the time EPA takes action on the RFP or attainment demonstration plan that relies on the emissions reduction, but commits to adopt and submit regulations in support of the emissions reductions prior to the time when the reductions are needed for RFP or attainment. EPA has found, under certain circumstances, that committal measures that are relied on to meet RFP, attainment, and/or other emissions reductions requirements of the CAA to be enforceable, and thus approvable, only if such measures identify the responsible party, applicability, adoption dates for rules (if applicable), implementation dates, and emissions reductions in terms of emissions rates (such as tons per day) equal to the credit taken in the RFP or attainment plan for the committal measure.

Back in 1995, when EPA reviewed the 1994 Pesticide SIP, we sought clarification from CDPR on whether the 1994 Pesticide SIP establishes a commitment to limit VOC emissions from pesticides to specific percentages of the 1990 base year emissions by specific years in specific nonattainment areas, regardless of future growth in emissions that might otherwise occur and whether the Pesticide Element establishes a commitment to adopt any regulations by a specific month prior to the implementation date. *See* letter, David P. Howekamp, Director, Air and Toxics Division, EPA Region 9 to James W. Wells, Director, CDPR, March 20, 1995. Later, we requested that CDPR modify the SIP to be explicit as to the dates of rule adoption and submittal and the emissions reductions by date and area. *See* letter, David P. Howekamp, Director, Air and Toxics Division, EPA Region 9 to James W. Wells, Director, CDPR, April 21, 1995. The clear implication in EPA's request to CDPR is that EPA believed at the time that such a modification of the 1994 Pesticide SIP was necessary to meet the minimum level of

enforceability for crediting the emissions reductions from such a committal measure. CDPR's response, via CARB, was the Wells memorandum.

EPA's views on acceptable committal measures have not changed significantly since the time of EPA's review and approval of the 1994 Pesticide Element in 1997, and thus, we can infer from the correspondence between EPA and CDPR cited above and EPA's statements in both the 1996 proposed rule and 1997 final rule that, in the absence of the Wells memorandum, EPA would not have approved the 1994 Pesticide Element on the grounds that it does not meet the minimum level of enforceability that the CAA requires. *See, generally*, CAA section 110(a)(2) ("Each such plan shall (A) include enforceable emission limitations and other control measures, means, or techniques ... as may be necessary or appropriate to meet the applicable requirements of [the CAA]"). We have no reason to conclude otherwise today, and thus, we affirm that, absent a commitment providing the specificity found in the Wells memorandum, the 1994 Pesticide Element does not meet the minimum requirements for enforceability of SIP committal measures.

Second, we discuss what actions EPA should take to address the deficiency in enforceability of the 1994 Pesticide Element as discussed above. We do so recognizing that CDPR has, since EPA's approval of the 1994 Pesticide Element, adopted and (via CARB) submitted regulations that in effect have converted many of the non-regulatory provisions in the 1994 Pesticide Element into a regulatory form. Specifically, CDPR has adopted and submitted regulations restricting the use of field fumigant application methods; requiring CDPR to annually inventory and report pesticide VOC emissions for each area; establishing pesticide use recordkeeping and reporting requirements; and creating a contingency field fumigation limit and allowance program for Ventura. These are the types of regulations that the commitment in the Wells memorandum would have made enforceable had the Wells memorandum been approved

into the SIP, and thus, we find no need to perfect the commitment to regulations in the 1994 Pesticide Element because the actual *submittal* of the regulations themselves obviates the need for an enforceable *commitment* to submit those same regulations.

While we believe that the submitted CDPR regulations fulfill the otherwise unenforceable commitment in the 1994 Pesticide Element to adopt and submit regulations, the question remains whether the regulations alone suffice to ensure that the emission reduction targets (20 percent from 1990 levels in the South Coast, Southeast Desert, Ventura, and Sacramento Metro areas and 12 percent from 1990 levels in San Joaquin Valley) are met. Based on our review of the regulations for this proposed action, we find that compliance with the emission reductions targets is provided through CDPR regulations limiting field fumigant application to lower-emitting methods and establishing a fumigant emissions limit and allocation system for Ventura County and monitored and enforced through regulations that require recordkeeping and reporting of pesticide usage and CDPR to annually evaluate and report VOC emissions from pesticides in each area.

These provisions are adequate to ensure that the emission reduction targets are met in the Sacramento Metro, South Coast, and Southeast Desert areas given that VOC emissions from pesticide use are typically 60 percent lower than 1990 levels in Sacramento Metro and Southeast Desert and 80 percent lower than 1990 levels in the South Coast. *See CDPR's Annual Report on Volatile Organic Compound Emissions from Pesticides: Emissions for 1990-2010* (March 2012), page 3. To a large degree, the reductions in VOC emissions from pesticide use (relative to 1990 levels) in these three areas have resulted from permanent changes in land use, although CDPR's regulations still serve an important function by reducing the VOC emissions from remaining pesticide use in the areas and by establishing a regulatory mechanism to track VOC emissions

from this source category that could, if necessary, provide the basis for additional regulatory measures if, for some reason, VOC emissions from pesticide use were to increase significantly over current levels.

For Ventura County, in recognition that VOC emissions from pesticide use are predominantly from fumigant use and are high enough that they could, in a given year due to fluctuations in pesticide use, violate the 20 percent emission reduction target, CDPR has submitted, and we are proposing to approve, additional regulatory provisions for that area. These Ventura-specific provisions require CDPR to set a field fumigant VOC emissions limit in its annual VOC emissions inventory report if overall pesticide emissions (not just fumigant emissions) in the Ventura nonattainment area are found to be within five percent of or exceed the listed benchmark. The benchmark is equivalent to the 20 percent emissions reduction target called for in the 1994 Pesticide Element for the Ventura area. The Ventura-specific provisions also require the county agricultural commissioner to add conditions to field fumigation permits or take other actions to prevent the field fumigation limit from being exceeded. As such, the regulations reasonably ensure that the 20 percent emissions reduction target would be met in Ventura County.

For the San Joaquin Valley, CDPR's regulations restricting fumigant application methods and establishing requirements on CDPR to inventory and report VOC emissions from pesticide use apply just as they do in the other four nonattainment areas. While these regulations and other measures have decreased VOC emissions from pesticide use in the SJV such that current VOC emissions are approximately 18 percent less than 1990 levels, CDPR concluded that a mechanism was needed to supplement the regulations to ensure that the 12 percent emission reduction target would be met in the SJV. The supplemental mechanism chosen by CDPR is the

adoption of a commitment, which we are proposing to approve in today's action, to manage VOC emissions from commercial structural and agricultural pesticide use, such that the related VOC emissions do not exceed 18.1 tons per day in the SJV. This level of emissions reflects a 12 percent emissions reduction from 1990 level of VOC emissions from pesticide use. The specific measures that CDPR would undertake to bring emissions back down to that level in the event that the annual inventory reveals that the 18.1 tons per day emissions level had been exceeded are not specified.²⁹ Considered in isolation, the revised commitment for San Joaquin Valley changes the form of the commitment in the 1994 Pesticide Element for the SJV but does not represent an enforceable measure for SIP purposes. However, when viewed in light of the CDPR's regulations, the combination of the commitment and fumigant regulations does meet the minimum requirements for enforceability of SIP measures and reasonably ensures that the 12 percent emissions reduction target from the 1994 Pesticide Element would be achieved in San Joaquin Valley.

For the reasons stated above, we conclude that there is no need to rescind or otherwise modify our 1997 approval of the 1994 Pesticide Element or our 2009 approval of PEST-1 notwithstanding the deficiencies in enforceability in the 1994 Pesticide Element due to the absence of an enforceable mechanism like the Wells memorandum. In short, this is because CDPR's regulations and revised commitment for the San Joaquin Valley provide the enforceable mechanism that would otherwise be lacking in the 1994 Pesticide Element. If EPA approves the regulations and commitment, as proposed herein, then the 1994 Pesticide Element would be

²⁹ CDPR has presented options for these measures. *See* CDPR presentation "Volatile Organic Compound Emissions from Pesticides: Options for Reducing Non-Fumigant Emissions" September 2011 and November 2011, which can be found at http://www.cdpr.ca.gov/docs/emon/vocs/vocproj/nonfum_options_091611.pdf http://www.cdpr.ca.gov/docs/emon/vocs/vocproj/nonfum_options_prec_111811.pdf

fulfilled. If, after consideration of comments, EPA concludes that the regulations and commitment do not meet the applicable CAA requirements, then the decision regarding EPA's previous actions on the 1994 Pesticide Element would need to be reconsidered.

V. Proposed Actions and Opportunity for Public Comment

For the reasons discussed above, EPA is proposing to approve under CAA section 110(k)(3) the revisions to the California SIP Pesticide Element submitted by CARB on October 12, 2009 and August 2, 2011 and to incorporate them into the California's federally-enforceable SIP. We are deferring action on the set of regulations submitted by CARB August 2, 2011 related to incorporating requirements related to methyl iodide into the fumigant regulations.

Based on the proposed approval of these SIP revisions, EPA does not plan to rescind or modify the Agency's prior approvals of the Pesticide Element because the Agency has concluded that the revisions fulfill the commitments of the original Pesticide Element, thus obviating the need to address the deficiencies in enforceability of those original commitments.

We encourage the public to comment on these proposals. Comments will be accepted for 30 days following publication of the proposal in the Federal Register. The deadline and a list of options for submitting comments is provided at the "Date" and "Addresses" sections at the beginning of this preamble.

VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely proposes to approve state

law as meeting Federal requirements and does not propose to impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735 (October 4, 1993));
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255 (August 10, 1999));
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885 (April 23, 1997));
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355 (May 22, 2001));
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629 (February 16, 1994)).

In addition, this proposed action does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249; November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on Tribal governments or preempt Tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

AUTHORITY: 42 U.S.C. 7401 *et seq.*

Dated: April 13, 2012

Jared Blumenfeld,
Regional Administrator, Region 9.

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